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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 92-111
)	
DEAS COMMUNICATIONS, INC.)	File No. BPH-910208MB
)	
HEALDSBURG BROADCASTING, INC.)	File No. BPH-910211MB
)	
HEALDSBURG EMPIRE CORPORATION)	File No. BPH-920212MM
)	
For Construction Permit for a)	
New FM Station on Channel 240A)	
in Healdsburg, California)	

To: The Commission

MASS MEDIA BUREAU'S COMMENTS IN SUPPORT OF
APPLICATION FOR REVIEW OR, ALTERNATIVELY
MOTION FOR EXTRAORDINARY RELIEF

Roy J. Stewart
Chief, Mass Media Bureau

Charles E. Dziedzic
Chief, Hearing Branch

Larry A. Miller
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554
(202) 632-6402

October 27, 1992

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List A B C D E

1. On October 13, 1992, Deas Communications, Inc. ("Deas"), filed an Application for Review or, Alternatively Motion for Extraordinary Relief. Deas seeks review of the Review Board's Memorandum Opinion and Order, FCC 92R-82, released October 21, 1992 ("MO&O") which reinstates the application of Healdsburg Broadcasting, Inc. ("HBI"). The Mass Media Bureau submits the following comments in support of Deas' request for relief.¹

2. The Hearing Designation Order, 7 FCC Rcd 3135 (1992) ("HDO"), noted that HBI's application contained several minor engineering discrepancies that did not cause the application to violate any of the Commission's core technical acceptance criteria. HDO, at para. 8. In addition, the application did not comply with the Commission's rule on prohibited contour overlap because HBI's computations did not comply with the methodology set forth in Section 73.215(b)(2)(ii). HDO, at para. 9. However, because the Bureau has in similar cases found that specific subsection to be somewhat unclear, the HBI application was not dismissed under the doctrine of Salzer v. FCC, 778 F. 2d 869, 875 (D.C. Cir. 1985). Instead, the application was designated for hearing and HBI was given:

one opportunity to submit a minor curative amendment with the presiding Administrative Law Judge after this Order is released. If the amendment fails to cure the defects, conflicts with a previously filed application, or for any other reason is

¹ Because the Commission's rules limit the Bureau's comments to five pages, we do not have enough space to address each error contained in the MO&O or to distinguish all of the cases cited therein.

unacceptable for filing, the amendment along with HBI's original application will be dismissed.

HDO, at para. 9 (emphasis added). The HDO did not note that HBI's application failed to comply with a core Commission technical rule which applies to directional FM antenna systems, Section 73.316(b)(2).

3. Had the Bureau discovered this error at the time, it would have dismissed the application as unacceptable for filing. See Showem, Inc., 6 FCC Rcd 7364 (MM Bur. 1991); North Carolina Central University, 6 FCC Rcd 6092 (MM Bur. 1991); Panama City Christian Schools, 5 FCC Rcd 5470 (MM Bur. 1990).² The Commission has always considered compliance with Section 73.316(b)(2) as a core engineering requirement necessary for the acceptance of an FM application regardless of whether for a commercial or non-commercial facility. See Broadcast Stations (Defective AM and FM Applications), 56 RR 2d 776, 777 (1984). Cf. Report and Order in MM Docket No. 87-121, 4 FCC Rcd 1681 (1989); Spanish Aural Services Co., 3 FCC Rcd 2739 (MM Bur. 1988); Michael J. Benms, 2 FCC Rcd 5945 (MM Bur. 1987); Rebecca Radio of Marco, 2 FCC Rcd 4043 (MM Bur. 1987).

4. On June 19, 1992, HBI filed a petition for leave to

² These cases involve non-commercial FM applicants, which have long been allowed to use directional antennas. Only since 1989 have commercial FM stations been permitted to use directional antennas to address short-spacing situations. Because the "hard look" rules do not apply to non-commercial FM reserved band applicants, the applicants in these cases were given an opportunity to correct the Section 73.316(b)(2) violations through amendment.

amend and amendment seeking to cure the engineering defects identified in the HDO.³ The Presiding Judge denied HBI's petition for leave to amend because the amendment was not acceptable for filing and ordered HBI to show cause why its application should not be dismissed. Memorandum Opinion and Order, FCC 92M-782, released July 16, 1992. HBI filed another petition for leave to amend on July 16, 1992, which the Presiding Judge denied at the same time he dismissed HBI's application for violating the Commission's "hard look" policy. Memorandum Opinion and Order, FCC 92M-874, released August 13, 1992. On appeal, the Board accepted HBI's July 16 amendment and reinstated its application. In so doing, the Board rejected the Bureau's view that a violation of Section 73.316(b)(2) warrants dismissal with the mystifying observation that the Board "will not second-guess the processing line...." MO&O, para. 13. Apparently, the Board overlooked the fact that their processing line is part of the Bureau.

5. Thus, the Board concluded that the Bureau's processing

³ In reviewing HBI's amendment, the Bureau discovered that the directional antenna proposed by HBI would have a radiation pattern which would violate Section 73.316(b)(2) of the Commission's Rules which prohibits a variation of more than 2 dB per 10 degrees of azimuth. The information provided by HBI in its "Horizontal Plane Relative Field Tabulation for Proposed Directional Antenna" (Exhibit-3, page 2), clearly indicated that the radiation pattern which HBI proposed would vary by 2.145 dB between 180 degrees and 190 degrees azimuth. This same excessive variation of 2.145 dB between 180 degrees and 190 degrees azimuth was present in HBI's pre-designation amendment which was returned for other reasons in the HDO. HBI's original application also violated the provisions of Section 73.316(b)(2) because the proposed radiation pattern varied by 2.086 dB between 115 degrees and 125 degrees azimuth.

line would not have dismissed HBI's first post-designation amendment as unacceptable, despite the fact that the Bureau provided contrary advice.⁴ The Board proceeded to grant HBI's second amendment, an amendment the applicant had no right to file by the terms of the HDO. The HDO had provided HBI with an opportunity to file one amendment as a matter of right. HBI failed to file a technically acceptable amendment. Furthermore, stated by the Bureau in its opposition to HBI's appeal, HBI failed to establish "good cause" for its July 16 amendment because it lacked due diligence in reviewing its application⁵ and in submitting a corrective amendment and because it did not show that the need to amend its application was unforeseeable. The existence of Section 73.316(b)(2) was foreseeable and the need for compliance with this rule was not unexpected. Moreover, as

⁴ As set forth in paragraph 3 above, a violation of Section 73.316(b)(2) constitutes an acceptability defect. Moreover, the fact that the HBI application was substantially complete and, thus, properly accepted for tender is irrelevant to a later determination that it did not comply with applicable Commission technical acceptance rules, such as Section 73.316(b)(2), and, therefore, should have been dismissed as inadvertently accepted for filing pursuant to Section 73.3566(a). See Report and Order in MM Docket No. 84-750, 50 Fed. Reg. 19936, 19941, 19946 (May 13, 1985), recon. denied, 50 Fed. Reg. 43157 (October 25, 1985), aff'd sub nom. Hilding v. FCC, 835 F.2d 1435 (9th Cir. 1987). See also Malkan FM Associates v. FCC, 935 F.2d 1313 (D.C. Cir. 1991) (affirming Commission application of "hard look" processing standards to dismiss an application as unacceptable for filing). The Board's failure to appreciate this salient point suggests a genuine misunderstanding of the distinction between acceptability and tenderability. See e.g. SBM Communications, Inc., 7 FCC Rcd 3436, 3437 n. 3 (1992).

⁵ See Quinto Broadcasting Corp., 6 FCC Rcd 5550 (1991); Pike Family Broadcasting, Inc., 6 FCC Rcd 5552, 5553-4 (1991), recon. denied, 7 FCC Rcd 4250 (1992).

the Commission has stated before, "an applicant cannot avoid dismissal of its proposal by assigning the responsibility for compliance with the acceptability criteria to its consulting engineer." Pueblo Radio Broadcasting Service, 5 FCC Rcd 6278, 6279 (1990).⁶ To say, as the Board has, that it is unforeseeable that an applicant will have to comply with Section 73.316(b)(2), severely undermines the benefits of the "hard look" policy and is contrary to the Commission precedent established in Pueblo, supra, and SBM, supra.

6. In view of the foregoing, the Board's MO&O should be reversed.

⁶ The instant case differs significantly from the situation in Magdalene Gunden Partnership, 2 FCC Rcd 5513 (Rev. Bd. 1987), where a post-designation amendment was allowed. In Gunden, the Board found, after relying on the Bureau's proposed findings, that the applicant's original proposal had complied with the Commission's city-grade coverage rules notwithstanding a shadowing problem. Therefore, the Board found that the addition of a city coverage issue and the need to amend were not foreseeable. See Pueblo Broadcasting Service, 5 FCC Rcd at 6279 n. 3. Here, by contrast, HBI's original application, as well as its first two amendments, violated Section 73.316(b)(2), thus, rendering the application and amendments unacceptable for filing.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau

Charles E. Dziedzic
Charles E. Dziedzic
Chief, Hearing Branch

Larry A. Miller
Larry A. Miller
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554
(202) 632-6402

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CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 27th day of October, 1992, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Comments on Support of Application for Review or, Alternatively Motion for Extraordinary Relief"** to:

Peter A. Casciato, Esq.
1500 Sansome Street
Suite 201
San Francisco, California 94111

Lawrence Bernstein, Esq.
Brinig & Bernstein
1818 N Street, N.W.
Suite 200
Washington, D.C. 20036

Jerome S. Silber, Esq.
Rosenman & Colin
575 Madison Avenue
New York, New York 10022-2585

Michelle C. Mebane
Michelle C. Mebane